Materials

INTERVIEW WITH JOHN CAIRNS: Transcript

TT ; We have already twice discussed next spring's Adam Smith conference, symposium and the other seminars in Japan, and therefore today I would like to ask you to summarise your basic plan of seminars and lectures. The first problem is, of course, from the 12th of next April to the 14th, when we will have the Adam smith conference in my Chukyo University's conference hall, and the main topic which we asked you to discuss there is Scottish legal education in the age of the Scottish Enlightenment, mainly relating to Adam Smith's lectures on jurisprudence. And in connection with this main topic, I would like to hear your opinions concerning the following points (I have two points mainly). The one is the general situation of lectures on jurisprudence as a part of moral philosophy at Glasgow and Edinburgh in the eighteenth century. And the second is, in the so-called Scottish Enlightenment, what roles did the Scottish jurisprudence and lawyers play? First, I would like to hear your views about these two questions.

JC ; Well, if we take the first one, the role of jurisprudence lectures in moral philosophy. If we take first of all Smith, about whom we have so much information, it is clear that his lectures on jurisprudence were part of his public course in moral philosophy. This is evident from the account of, say, John Millar, of the lectures that Smith gave on ethics, the work that ultimately became his theory of moral sentiments. The third part is the lectures on justice and there is a fourth part devoted to police, which he also regarded as an aspect of jurisprudence. Now, why in classes in moral philosophy did they discuss notions of justice? Well, this has to do very much with the influence of the natural jurisprudence tradition stemming from the work of Grotius and Pufendorf, both of whom dealt extensively with

matters of justice. The name that is now taken as most significant in Glasgow at the beginning of the eighteenth century is, of course, Gershom Carmichael, and Carmichael produced a student text book based on one of Pufendorf's works, and which went through several editions, including one in the Netherlands. The next famous name one thinks of in Glasgow in moral philosophy is, of course, Francis Hutcheson. And he too in his lectures was interested in questions of justice, although not one suspects in the fully rounded-out and worked-out way that Smith was.

Now what interests me in the lectures in jurisprudence very strongly is the way in them he connects law and the development of law with his four-stages theory of society, where he sees law as related to historical development. So in his historical scheme of hunters, pastoralists, agricultural society and finally, commercial society, he sees different laws as appropriate for different stages, and he works out an historical development relating to them. But nonetheless, of course, it fits into his moral philosophy course; it is not just a question of lectures on legal history. (Indeed they are not in a modern sense legal history.) Because, of course,in any question of a moral philosophy which involves discussion of society, justice is an important topic.

TT; Yes, as a social theory, isn't it ?

JC; Yes, exactly so. And it fits in this sense into history within moral philosophy.

Now, continuing on after Smith in Glasgow, for Smith was succeeded in the Moral Philosophy chair by Thomas Reid. Now Thomas Reid was very different in his approach to philosophy, and it is interesting, I think, that Smith's own pupil, a man I am particularly interested in, John Millar, carries on Smith's tradition of natural jurisprudence, and in his lectures on law gives a course of lectures on jurisprudence which are very, very strongly influenced by Smith's theories, as I think has been demonstrated most brilliantly by the work of Knud Haakonssen

who has written such an excellent book, on Smith's Science of a Legislator and also in his study of John Millar. Millar carries on the Smithian natural jurisprudence tradition to the end of the century in Glasgow.

In Edinburgh, the position is more difficult. One thing that is very interesting for a legal historian of the eighteenth century such as myself is that in Edinburgh, in 1707, they established the chair of Public Law and the Law of Nature and Nations, and just the very title of this chair immediately alludes to the tradition stemming from the writings of Grotius. And it is also interesting that in the same year that this chair was established, a man who had been a regent in philosophy in Edinburgh, William Scott, but who was not appointed to the chair, I may say, also published a book as a student text book based on Grotius.

Now, so there is a lot of interest in thess matters in Scotland. For example, recently, to digress slightly, I have been carrying out work on a man called John Spottiswood, who taught privately in Edinburgh. One of the interesting things about Spottiswood is that his library catalogue has survived, and he had a very large and fine library, and on looking through this library catalogue we see just how many books Spottiswood had not only written by Grotius and Pufendorf, but also by other scholars discussing Grotius and Pufendorf. And this is particularly interesting, since Spottiswood is not a distinguished scholar. He was an important man for a variety of reasons, but he was not important for his intellectual brilliance.

TT ; Excuse me, but is his name's pronounciation Spotswood or Spottiswood?

JC ; Yes, Spotswood, he spelled his name in a variety of ways, but I think it would be pronounced Spotswood.

TT ; And did he edit law reports, like Stair's reports?

JC ; Well, he did edit the decisions of two earlier judges, Lord Falconer and Lord Newton, and also his grandfather was President of the Court of Session .....

TT ; Ah, I see.

JC ; ..... and he published his grandfather's *Practicks*.

TT ; Ah, I see, I confused Spottiswood and his grandfather Spottiswood.

JC ; Yes. But Spottiswood himself is much more important in the history of law teaching. He is not important, say, in the history of ideas; but from his published works we can see that he is a learned man, I mentioned him because we can see, at the beginning of the eighteenth century in Scotland that lawyers and philosophers are interested in coming to terms with this new type of natural law philosophy stemming from Grotius and Pufendorf, although of course they differ, but it is fair to bracket them in this way. And obviously one can see how together the theories of someone like Grotius could pose problems for moral philosophers who were essentially Presbyterian theologians, like Francis Hutcheson.

And then we can also see how it is of interest to the reflective lawyers, when one thinks of the context in Scotland of the settlement after 1688-1689: one king has gone, a new king is given the throne, which puts at issue questions of authority in society. What is to be the basis of political authority, when one can no longer claim that kings are kings by an unalterable right of descent? And of course, the theorising of people like Grotius, Pufendorf and, of course, when one thinks of 1689, one instantly thinks of Locke, provides materials with which to try to establish a way of understanding their society and their law.

Turning to lectures on jurisprudence, in Edinburgh the chair of Public Law and the Law of Nature and Nations was founded in 1707. It does not appear, for whatever reason, that the hold-

ers of this chair ever had great success in attracting students. But that is not a matter which has been fully investigated. It is often said that the chair was a sinecure, but I am not so sure of that, because one does come across hints that the chair was not just a sinecure for an advocate, to give him a pension from the government. I certainly know that in the 1750's and 1760's, the Faculty of Advocates, who were the Scottish bar, tried to persuade those who were going to become members of the bar to attend the lectures of the Professor of Public Law at Edinburgh, and they twice passed resolutions to this effect, and resolved that the examiners for the Faculty of Advocates would ask would-be advocates questions which would bear on the teaching of the Professor of Public Law at Edinburgh. But I am afraid that, in the eighteenth century, the various holders of the chair of Public Law have left very little trace of what they actually taught.

TT ; Then can we say that in the eighteenth century Glasgow was the centre of jurisprudence in Scotland, not of law teaching in general, and not a centre for lawyers, but of jurisprudence?

JC ; Yes, well I think that is fair. There is always the danger that one can make statements based just on the random survival of evidence, but it does seem fair. And I am afraid we lack informatian about the teaching of the first two professors in moral philosophy in Edinburgh, although we know the third used Pufeudof as his text. Later in the century, of course, there are distinguisted holders of the chair such as Fergusson and Stuart. But certainly, when one thinks over the eighteenth century in Scotland, and the teaching of jurisprudence, it is obviously the University of Glasgow that instantly leaps to the mind with Adam Smith and then his pupil John Millar, although Millar was the Professor of Civil Law rather than of Moral Philosophy.

TT ; I think these two questions are quite general and a kind of

background to Adam Smith's lectures. Therefore, in addition to these general problems, we would like to ask the following questions concerning his lectures. First, how did Adam Smith learn law, and how thorough and how correct is Smith's knowledge of law? Is it as good as a lawyer's? Next, please tell me about prominent persons among the attendants of his lectures, including John Millar.

JC ; Yes, to take the first point: his knowledge of law-how did he acquire it? As far as we know, Smith had no formal education in law. Although, of course, he did know a great many lawyers, and had strong connections with some of them. In fact, he received patronage notably from, for example, Lord Kames. Now, when we look at his lectures in jurisprudence, they strike me as very much those of a philosopher looking at the law, and he is using legal evidence to explain and to develop his theories.

TT ; You mean his own historical theories?

JC ; Well, I think it is historical in a sense. For example, a lot of his evidence is, as you yourself have pointed out in your paper, substantially related to Roman law. Now, Roman law, at the time Smith was teaching, was one of the oldest established disciplines in the universities. But Smith is not in any way someone whom one could describe as gaving a high, or technical, knowledge of Roman law. He is using it for evidence for his work, and I think it is interesting to note that there are a lot of textbooks in the eighteenth century, and one of the books Smith is clearly using is the text book of Heineccius on the antiquities of Roman law. This was a standard textbook of the period. And, in fact, for the period you could not draw on a better source of material. It was a very good book. Other student texts of Heineccius were used as the basic textbooks in Roman law teaching in both Edinburgh and Glasgow in the later eighteenth century.

Now, was Smith's knowlege of law profound? It depends

what one means by "rofound". One could say it was profound in his relating of law to his philosophic concerns, and his grounding of legal development in his lectures on jurisprudence in the four-stages theory of society. He is trying to go beyond the surface legal rules to relate them to social change and social development. In that sense one can say that it was profound.

But it is not my impression that it was profound in the other sense. He does not reveal in the lectures on jurisprudence the lawyer's kind of discussion of knotty legal problems. But, of course, that was not relevant to what he was doing in the lectures on jurisprudence. He discussed English law, and also Scots law to some extent; but, of course, he was always drawing on these, as on Roman law, for examples to illustrate his lectures. They are not in any sense lectures in law.

TT ; I can completely agree with your opinion that for Smith law is material which he uses to explain, for example, the development of society. But, when we compare Smith's lectures on moral philosophy as a whole with, for example, those of Hutcheson or Adam Ferguson, I think Smith devotes his lectures much more to law than they do. I think for Smith in particular there is something important in the law.

JC ; I think that is right. In fact, yes, I entirely agree with you there. Because certainly in what Hutcheson says we find nothing like the lectures on jurisprudence, and similarly for Ferguson. Hutcheson discussed natural law, but without Smith's historical approach. Why Smith devoted so much more to it is something that I would find difficult to say much on without giving it further thought.

There are, of course, the explanations we find at the beginning of the surviving lectures on jurisprudence. One can start looking at a whole variety of philosophers of the period, and above all at David Hume, and we can see that in the *Treatise*, and in the *Enquiries*, he does talk about justice, but he does not have the fully worked-out treatment that Smith gives. I shall just quote

what Smith says at the begining of his lectures as reported: "Jurisprudence is the theory of the rules by which civil governments ought to be directed. It attempts to show the foundation of the different systems of govermnent in different countries and to show how far they are founded in reason". And then he develops on this, and he goes on to say that one of the first aims of civil government is justice,and justice between its citizens.

In one sense I suppose you could say that the lectures on jurisprudence are a kind of practical working-out of his moral philosophy. What he is doing is using his general philosophy to explain how civil governments ought to promote justice in their society. He also explains what justice is, using his four-stages theory, so that justice in commercial society is different from justice in agricultural society and so on.

One of the things that always strikes us as interesting about this is that his lectures are not only descriptive of justice in different societies, but there is always also in them, a kind of implicit, or perhaps rather than implicit, potential critique. One can look at his theories and then use them to criticize what government is doing as regards the promotion of justice within society. For example, one strong theme in the eighteenth century Scottish thought is improvement, improving society, and the promotion of commerce and industry and agriculture, and so on. One very strong debate which involved many lawyers in Scotland, in the middle years of the eighteenth century, after the failure of the Jacobite rebellion, is the abolition of entails in land. Now, from Smith's jurisprudence one carried a critique of the system of entails.

TT ; And in the *Wealth of Nations*, he strongly criticizes entails, dosn't he?

JC ; Yes, yes, and it is such an obvious thing. The *Wealth of Nations* is in a sense a treatise of legislative science to promote the well-being of a society. And, as Nicholas Phillipson has

pointed out, it is interesting to see how deeply involved many of the lawyers were in the movements to abolish entails. Phillipson relates this to the peculiar circumstances in Scotland in the mid-eighteenth century, and his adoption of a civic humanist interpretative strategy. Be that as it may, it is important to note that entails came so strongly under attack from the legal profession, although the complexities of them must have given them a great deal of business.

TT ; Then, how correct is Smith's knowledge of law?

JC ; Yes, as far as I am aware he gets things correct. He makes a few slips here and there, as the editors of the lectures have pointed out; but generally correct. He is dealing with law in a relatively broad way. I mean, when investigated closely, it is possible to trip him up on small points. But generally when one looks at, say, his account of what he describes as real rights, what he says is so very general in many ways that it is difficult to fault it.

Roman law is a subject that has been so intensely studied in the past two hundred years that our views would have in many ways changed; and it may be that we would interpret overall the history of Roman law differently from Smith. But to speak broadly, when he discusses, say, pignus to take one example, what he says can not be faulted. In any case, it does not strike me that it is so important whether he is right or wrong. He is drawing on the scholarship of his age, and modern scholarship might view the history of Roman law somewhat differently, but he is I think usually correct.

TT ; Then, last question on the Smith conference:please give me your opinion about Smith's lectures on jurisprudence as a legal theory. Because in this year's IVR congress, when I read my paper on Adam Smith's theory of law, Professor Raphael of London University asked me what do you mean when you mention Adam Smith's legal theory. Because Professor Raphael said

he did not think that Smith had his own legal theory.

JC ; Yes, well I was not sure exactly what Professor Rapheal meant. If it is not a legal theory I do not know what it is . I can only assume he was alluding to the fact that the lectures are part of his course on moral philosophy. This could mean that it might be somewhat artificial to separate them off and say: this is his theory of law. And if so, if it is not a legal theory, I am still puzzled as to why not. I thought it was interesting that Dr Haakonssen, who is devoted a book to Smith's legal theory, strongly disagreed.

TT ; I think, in my understanding, this problem is just a problem of definition.

JC ; Yes, yes.

TT ; We have actually lots of legal theory in our history of law, and therefore we can define it in various ways. For example, if we compare Smith's lectures with, say, Stair's *Institutions*, we must say the former is much inferior to the laters at least at the level of "legal theory". But if we compare Smith with Hobbes, we can also say Smith has, in a sense, a better theory than Hobbes. In any way I think this problem depends on what definition of legal theory we apply to Smith's lectures.

JC ; Yes, yes. I think I agree with you that it may be perhaps just a definitional disagreement. If Professor Raphael mean that Smith's intention in giving these lectures was to carry on his moral philosophy course, where he comes to discuss civil government, well, of course, that is correct. But, on the other hand, one can certainly look at the lectures and say this is a worked-out legal theory, explaining how historically law has come about and justifying it according to a notion of justice and, of course, utility. And certainly others used Smith's views as a legal theory. For example, Smith's pupil, John Millar, clearly

takes it and uses it as a legal theory, not only for his lectures on jurisprudence, but he uses it as a legal theory in his lectures on Scots law and Roman law. So it does strike me that one can read the lectures as a legal theory.

TT ; Thank you very much for your comment now and at that time of IVR Conference.

JC ; Yes, I was somewhat surpprised at Professor Raphael's comment, and I could not quite see why he thought it was not legal theory. And, for all these reasons, Smith provides a historical explanation and a moral justification of law. And this strikes me as a legal theory. Of course, I think Professor Raphael may also have been thinking of Smith's 1785 letter to La Rochefoucarld in which he talks of working on his theory of law and governmeut. Obviously, he did not finish it, and we do not have his final views; but I think the lectures give us a fair idea of what it would have been.

TT ; Yes, I think so. Er, now I would like to turn out topic to the symposium on Scottish legal history which will be held as the second day's programme of the Annual Meeting of the Japan Legal History Society at Aoyama-Gakuin University in Tokyo. And as to this symposium I have the following plan:namely, first I read a paper on the general history of Scots law from the twelfth century to present focussing on several epoch-making events, for instance the establishment of the Court of Session, er, the Union of the Crowns, Cromwellian age, and the Union of 1707. And next you read a paper on, for instance, education and training of lawyers, er, inside and outside of Scotland, and the establishment and development of the original Scottish law by them.

Erm, I have such a plan like this, but this plan is just only my own plan and therefore before our next spring symposium I would like to know your opinion concerning the following basic points, er, which I think are the most interesting for Japa-

nese lawyers. That is to say, first, how far do the Scottish and the English legal systems support each other, and second, what is the main factor which makes each legal system so different, and lastly why nevertheless can they live together in one United Kingdom.

JC ; Certainly. At the moment, I think I shall say a few things about the last point first, why we can live together in one system. Well, the first point on this is a technical point, namely Scotland still has in most matters a separate civil service administration. This, of course, dose not apply to matters relating to revenue or foreign affairs, or anything like that; but in all the other areas of government, areas which in England are covered by the Home Office, the Department of Trade and Industry, the Department of Health and Social Security, there is a separate administration for Scotland. And therefore, for matters that are not politically contentious, where legislation on technical matters is generated by the civil service through consultation with interested bodies, the Scottish element is always taken into account, and there often will be different legislation for Scotland.

Now, a second point is that, in recent years, since the late nineteen-sixties, much reform, which is technical lawyer's reform, has been generated in Scotland by the Law Commission for Scotland and in England by England's Law Commission. And there are separate bodies. They consult with one another of course, and they will sometimes produce joint reports, but they will essentially carry on both systems.

To take one area : in recent years, the Scottish Law Commission has done a lot of work on Scottish family law, and in many ways the reforms are broadly similar to the reforms that have been carried out in England. But they are broadly similar likewise to reforms that have been carried out in many other countries in the late twentieth century, and they have not operated towards a greater assimilation of the legal systems.

A third point is that the two countries have maintained

separate court structures and separate legal professions. The only place where the court structures join together, if that is the appropriate term, which I am not sure it is, is in the House of Lords, and the House of Lords in civil appeals only, because Scottish criminal appeals do not go to the House of Lords. And the separate court structures, the separate legal professions, the separate civil services, have in many ways kept the laws and the legal systems distinct.

Now this is not to say that, over the course of many centuries the legal systems have not grown closer together ; but they have still maintained a separate identity. I do not especially foresee that changing, although we are now operating within a general European context with the European Community, and it is difficult to foresee exactly what will happen in the future. Although it dose make sense for the laws to be similar in the treatment of commercial matters, but nonetheless the two legal systems have remained distinct.

But they have of course mutually influenced one another. For example, the case that has been regarded as the most important torts case in England in this century is the famous case of Donoghue against Stevenson, which is a Scottish case which went to the House of Lords. The House of Lords came to the view that in the matters Scots law which they were discussing was, in all essential points, the same as English law, and the judgement made precedent for English law as well as Scottish law. To sum up : the separate profession, separate courts, separate civil service administrations, and the two Law Commissions have kept the legal systems distinct.

Now the main reasons for the differences are historical. The union of the Parliaments in 1707 preserved the Scots law and Scottish courts, which were only to be changed when it was for the evident utility, an interesting term, of the Scottish people. And by 1707 the two legal systems were really very different. It is interesting that, in the mediaeval period, Scots law adopted much from Anglo-Norman England, and that the two legal systems were very similar.The English legal system changed

dramatically, whereas, in the later mediaeval period, the Scots law and Scottish legal system did not undergo the dramatic changes that the English legal system underwent. And so it was that by 1500, the Scottish legal system was still recognisably the same legal system that had been adopted from Anglo-Norman England, whereas by this time the English legal system was very different indeed. And then comes the all-crucial event, an event which you mentioned, namely, the foundation of the Court of Session in 1532.

The Court of Session in 1532, apart from in a few instances, got rid of process on brieves, and juries and adopted a form of procedure based on the Romano-Canonical procedure of the church. And my hypothesis is that it is from then that Scots law starts to develop on very different lines, because once the focus of the operation of the legal system moved from procedure on brieves, or, what is the crucial thing, choosing the brieve, once the focus goes from that, and actions are initiated by petition, and heard by a bench, some of whom have legal training, and without a jury, there is a greater opportunity for substantive legal issues, rather than procedural legal issues, to become of much greater importance.

In the sixteenth century, we can start to see cleary for very first time, a professional bar in the Faculty of Advocates based in Edinburgh, and we know that many of the members of the bar studied law abroad. Now we know that many Scots studied law abroad before that period, and also know that we can probably trace people whom one can see as, I suppose, men of law before 1532, but it is only really in the sixteenth century that a bar in Scotland starts to take on a strong collective identity. And they have a training in Roman law, or many of them do.

Later, in the next century, the seventeenth century, especially after 1660, after the restoration of Charles II in 1660, the Scots bar, the Faculty of Advocates, starts to become a much stronger institution and much more independent of the bench. They gain much more control over their admission procedures, and they

formalise the procedure (which had existed in embryo from before) of entry by examination on Roman law. And there was an alternative mode of entry by examination in Scots law, but that was rare. Most advocates entered by examination in Latin on Roman law. And the desirable means of gaining a knowledge of Roman law was still thought to be education in Roman law at a European university. And we know that substantial numbers of Scots studied law abroad, and continued to do so until the middle years of the eighteenth century.

Now, I think this form of training for the Scots bar was dramatically different from the training of the English bar. And in the tremendous development of Scots law in the sixteenth and seventeenth centuries, lawyers drew on this Roman law background. Scots land law remained feudal land law, and Scots family law remained largely derived from the pre-Reformation canon law of the Catholic church. (Parts of it also were derived clearly from Roman law, and parts were inter-related with land law issues, such as the rights of widows and widowers in the lands of their deceased spouse) . When we come to the area of obligations, we find in mediaeval Scotland a whole variety of different actions for what would now call delict or torts, for wrongs done. But when, in the seventeenth and eighteenth centuries, Scots lawyers came to write about these themes and to try to make sense of all these disparate actions, what they drew on as organising principles were Roman legal concepts. This means that if one looks at the writings of certain classical writers on Scots law, such as Lord Stair or Sir George Mackenzie (and I mean Mackenzie on civil law rather than his more famous work on criminal law) , and later, in the eighteenth century, at the writings of Erskine and Bankton, they have given their account of Scots law in certain areas a very Roman cast, not only in organising, but also in how they explain individual contracts, and in the way they use very Roman terminology in discussing individual contracts.

Now I do not think one has to presuppose that they were drawing directly on Justinian.What they were drawing on were

the writings of the mediaeval and early modern period on civil law and canon law. Obviously, if one takes the area of obligations and contracts especially, there has been some kind of very complex process of influence through canon law notions of promises and binding oneself. Roman terminology is used for the classification of contracts as well.

And it ends up with certain interesting features. Thus, in English law, and in legal systems derived from English law, one finds that consideration is a very important part of the contract ; but there is no requirement of consideration in Scots contract law. In some ways this can seem trivial, but it can actually have very important implications even in the area of commercial law. In Scotland you could be held bound to promise you have made, for which you have gained no consideration. And this particular substantive difference between English law and Scots law derives from their different legal heritages.

TT ; And now you have mentioned the doctorine of consideration, which is an English concept, and which shows such a difference between Scottish and English law. But how about another quite important concept, that of *stare decisis*, binding precedent? I woud like to know, in Scotland, theoretically, not practically (of course, if we say practically even in Japan or in Geramany precedents have quite strong binding force in the lower court decisions) , can we say that in Scotland there is such a theory of *stare decisis.*

JC ; Yes, I think one can say there actually is, certainly in modern Scots law. I think in modern Scots law one would regard lower courts as bound by the decisions of higher courts, exactly as they would in English law. In Scots law, as in English law, I think this is essentially a nineteenth-century development. If one looks, for example, at Blackstone, one does not find the theory of *stare decisis* there, just as one does not find it in any eighteenth-century Scots writer. But my own understanding of English legal history, (and I have to say this with the qualification that I am not an English lawyer, nor an English legal historian), is that

strict *stare decisis* is a nineteenth-century doctrine. At the same time as it developed in England, it developed in Scotland, and presumably for the same reasons as it developed in England. And the two systems of course do interact, people are aware always of what is going on in the other system.

Even before that, one can see that case law was obviously very important. From the very beginning of the Court of Session in 1532, people collected decisions of the court. Although the first set of decisions to be published was that of Lord Stair, it was soon followed, by many other collections. The second set of decisions to be published was that of Durie which came from the first half of the seventeenth century. Very quickly thereafter editions were brought out of other collections of decisions, and from around seventeen hundred, from reading the records of the Faculty of Advocates, we can see that the Faculty of Advocates becomes very concerned to collect the decisions of the Court of Session, and makes strong efforts to arrange for reports. They wanted this material to be published.

But then again this is nothing unique. One finds the same collecting of decisions throughout most of Europe, but of course there is nothing like the doctrine of *stare decisis*. I am inclined to think that the doctrine of *stare decisis* in Scots and English law relates in the nineteenth century to many of the same factors that induced or produced codifications in some of the European countries : namely, a greater search for firm rules, definite rules, and hence certainty of the law. And one wonders to what extent this relates to the development of more positivist theories of law in the nineteenth century. I think there is some connection there.

To go back to England, England had an extremely complex court system until the reforms in the later nineteenth century, and it is only in the later nineteenth century that one finds in the English courts a clear hierarchy, which is one of the foundations of *stare decisis*.

TT ; That is in 1870s, isn't it?

JC ; Yes, there we find the clear hierarchy of House of Lords, Court of Appeal, and the various divisions of the High Court in England. And it is obviously this kind of rationalising of the legal system in England that helps produce *stare decisis*, or makes it possible at least. But certainly *stare decisis* in modern Scots law is as important as *stare decisis* in modern English law. There are trivial differences between the systems but, these relate to the slightly different forms of the Scottish courts and English courts.

TT ; My opinion is that *stare decisis* requires the hierarchical system of judicature and its centralisation is the necessary condition of such. In England, of course, from at latest, the fourteenth century, they had a Kihg's court which was a centralised court, and from that time, they gladually established the common law system, and therefore I think for England the theory of *stare decisis,* although it is, of course, not the ninteenth coutury's strict one, is earlier. But in Scotland, the Court of Session, which is the central court in all of Scotland, dates only from 1532, furthermore even after the establishment of that court, unfortunately there was not so good a structure of courts like the English. In this sense, I think in Scotland historically it is more difficult for a binding force of precedents to be established than in England.

JC ; Yes, well, what do I think happen in Scotland in 1532 with the foundation of the Court of Session? The Court of Session is a collegiate court, and decisions are decisions of the whole bench, and it was possible in Scotland of course to take, what I suppose we would now call an appeal to the parliament. But generally, one could enter against the interlocutors of the Court of Session what was described, or what still is described, as a reclaiming motion, and the reclaiming motion went to the same court. There was not a hierarchy. Nonetheless in legal argument it is very clear that now the very beginning of the Court of Session great attention was paid to the decisions of the Court

of Session, and there was a natural tendency to follow decisons. But certainly one does not find *stare decisis*, where decisions have to be followed, that is true.

TT ; Okay, thank you. The last question is, please let us know freely your opinions on Blackstone, I mean that in connection with the seminar on Blackstone which will be held in Nagoya University, I would like to know your general opinions on Blackstone, in particular from your viewpoint of Scottish law.

JC ; I find Blackstone an interesting writer. I developed an interest in Blackstone in a very curious way. I wrote my Ph.D. thesis on codification in Louisiana in 1808 and Quebec in 1866. And of the works used by the codifiers in Louisiana in 1808, was Blackstone's *Commentaries*. (This was not my discovery, I should say, others had pointed this out.) This surprised me in some ways. And I looked at Blackstone, and one of the things that struck me on reading Blackstone was how similar he was to the Scottish writers whom we call institutional writers, and how similar he was to the whole class of writings of institutes, that were for the first time, I think, discussed by Klaus Luig in an article in the *Juridical Review*. I struck me that Blackstone was very much a part of genre of writing in the seventeenth and eirhteenth centuries.

Now I also find interesting in Blackstone, that, as most recently Alan Watson has shown, and it is also something I have looked at myself, he has adopted a structure for the *Commentaries* influenced by the structure of Justinian's *Institutes*, not an exact copy by any means, because he is of course dealing with very different law. But he uses the institutional structure at some level as an organising principle for English law. I also find Blackstone an attractive writer in so far as he is very readable, which not many lawyers who write on law are, but the *Commentaries* are nicely written and accessible.

I read much of the literature that has been written on Blackstone recently, and what struck me about it was the way that

English legal historians have been reassessing Blackstone in the past forty or fifty years. Although he had been historically so important, he suffered an eclipse largely, it seems, through the criticisms of Bentham, and, to a certain extent, of Austin. But now one finds writers such as Milsom, in an article in the *Oxford Journal of Legal Studies,* and also Brian Simpson saying that not only was Blackstone interesting, but that Blackstone was crucial in the development of English law, in so far as he helped changed it from a law of disparate actions towards being thought about more systematically.

Now since I am not an English legal historian I can not really comment on the accuracy of this last point, but this has also struck me as an interesting revolution in the thought of English legal historians. Blackstone suddenly is coming to be regarded as important. He has for a while been regarded as important in the United States, and for many years in the United States, in the nineteenth century, Blackstone was the law. But while he had been in many ways criticised and denigrated in the nineteenth century for superficiality, for making wrong statements and so on, now English legal historians are treating him much more seriously, and seeing him as helping in the move to give shape to English law, and in the move to treatise writing on English law. And in all of this it seems to me that he played a function very similar to the function of, as Luig pointed out, institutional writings throughout Europe. This is also interesting in that it then connects English legal history with general European legal history. One can see that English legal history is not curiously unique ; it is rather part of general European legal history.

Now it is different of course, and perhaps more different in its development than other countries. And English law was obviously unique in the early centralisation of the courts and the early development of a secular legal profession with its own very specialised body of law. But just as Bracton obviously drew on Roman law for his treatise to give some shape to his account of English law, so Blackstone and other writers in the eighteenth

century such as Thomas Wood, or subsequent to Blackstone, one of his successors in the Vinerian chair, Wooddesson, again used schemes derived from Roman law to give a shape to English law. It is also I think interesting in this respect that Blackstone's *Commentaries* derived from his university lectures. Wooddesson's book is also derived from his lectures at Oxford, and Thomas Wood, although his book did not derive from university lectures, was a man who had written a treatise calling for university lectures. This again all fits the development that Luig and others have pointed out in Europe, when in the eighteenth century university lectures in national law become important for the first time.

TT ; Lastly please tell me your opinion on how Blackstone sees the Scottish legal system in his *Commentaries*. I think he mentions the Scottish law, the Scottish legal system, but not, of course, so much as the Roman law.

JC ; He does allude to Scots law from time to time, and he was obviously familiar with writings on it. I have noticed, for example, in his account of the history of feudalism, he draws on the writings of Thomas Craig. Also, in his account of equity, he referes to Lord Kames's *Principles of Equity*. But you are right, he does not make much of it. I can see why he would be interested in Kames's *Principles of Equity*, with which he disagreed at certain points. But the thing that struck me most obviously about Blackstone which also one finds in his successor in the Vinerian chair Chambers, is the use of Thomas Graig's book on feudal law, for the history of feudal law.

TT ; In connection with this present question, lastly, do you think that Blackstone had read, for example, Lord Stair's *Institutions of the Law of Scotlnd*, or *Erskine's Institutions* who is almost the same generation as Blackstone. You point out that Blackstone is just like the Scottish insitutional writers, but one century before Blackstone's *Commentaries*, in Scotland there is the quite

nice institutional treatise of Stair's. How do you think about this, the kind of possibility of …

JC ; It is a possibility, but I do not think there is. But it does not mean that he was not familiar with it. Or with Erskine, he could, well have seen Erskine's *Principles* which are a shorter work than the *Commentaries*, but they first appeared in 1754, so it is conceivable he could have seen them in the same way as it is conceivable that he could have seen Stair. But I think I am right in saying there are no direct references.

TT ; Okay, thank you so much. I am looking forward to your going to Japan and giving lectures and seminars to our Japanese colleagues of not only the lawyers but also the scholars who are interested in Scottish Enlightenment.

JC ; Thank you very much. I may say I am very excited and honoured by the thought of going.